



AUG 5 2003

GSA Office of Governmentwide Policy

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR *Rodney P. Lantier*
REGULATORY SECRETARIAT AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2001-031, Deferred Compensation and
Postretirement Benefits Other Than Pensions

Attached are comments received on the subject FAR case published at 68 FR 33326;
June 3, 2003. The comment closing date was August 4, 2003.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
2001-031-1	08/04/03	08/04/03	Lockheed Martin
2001-031-2	08/04/03	08/04/03	ABA
2001-031-3	08/04/03	08/04/03	AIA
2001-031-4	08/05/03	07/21/03	NDIA

Attachments

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2001-031-1

LOCKHEED MARTIN

Anthony M. DiPasquale
Vice President
Government Financial Management

August 4, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street N. W., Room 4035
Washington D. C. 20405

Attn: Laurie Duarte

Subject: FAR Case 2001-031

Dear Ms. Duarte:

Lockheed Martin Corporation (LMC) appreciates the opportunity to submit comments concerning the proposed revisions to FAR 31-206(k) Deferred compensation and FAR 31-206 (o) Post retirement benefits other than pensions.

LMC supports the comments submitted by Aerospace Industries Association and National Defense Industrial Association. LMC has no additional comments on the proposed changes to FAR 321-206(k).

LMC strongly objects to the change to 31-205-6(o) relating to the manner in which contractors refund the government's share of previously funded PRB costs due to termination or curtailment. It is inequitable and should be eliminated. Requiring the contractor to refund the entire amount in the current year, with the Government determining the method, ignores the interest of the contractor. The current language is silent on the method and time period. This allows contractors and the government to negotiate the method and time period for such refunds on an equitable basis. The elimination of the last sentence in 31.205-6 (o) (3) would allow the contracting parties to determine the appropriate refund on a case by case basis, and consider the interest of both parties. Also, allowing the contracting parties to negotiate is consistent with CAS 413 and the ANPRM on PRBs.

Again we wish to thank the Civilian Agency Acquisition Council and the Defense Acquisition Council for the opportunity to respond to these proposed rules. We believe our comments are fair to both sides, and will result in a more equitable regulation. I would welcome further discussion and /or questions on these matters.

Sincerely,

for Anthony M. Pasquale

Rec'd
8/4/03
WA

2001-031-2



AMERICAN BAR ASSOCIATION

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2002-2003

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August 4, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, DC 20405

Attention: Ms. Laurie Duarte

**Re: FAR Case 2001-031
Proposed Rule: – Deferred Compensation and Postretirement Benefits
Other Than Pensions
68 Fed. Reg. 33326, June 3, 2003**

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter.¹ The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees contain members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views

¹ The Honorable Mary Ellen Coster Williams, Chair of the ABA Section of Public Contract Law, has recused herself on this matter, did not participate in the Section's consideration of these comments, and abstained from voting to approve and send this letter. Similarly, Council Member Daniel I. Gordon recused himself on this matter and did not participate in either the preparation or approval of these comments.

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expressed herein have not been approved by the House of Delegates or the Board of Governors to the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section applauds the FAR Council's efforts to improve the formatting of the subject FAR subsection but has substantive concerns regarding the proposed FAR 31.205-6(o)(3). Relevant portions of the proposed rule are excerpted below:

The Government shall receive an equitable share of any amount of previously funded PRB costs which revert or inure to the contractor. Such equitable share shall reflect the Government's previous participation in PRB costs through those contracts for which cost or pricing data were required or which were subject to subpart 31.2. The contractor shall credit the equitable share to the Government either as a cost reduction or by cash refund at the option of the Government.

The Section's concerns are summarized as follows:

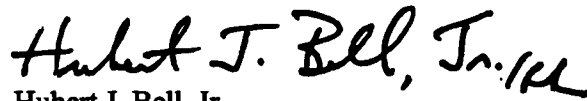
- The proposed revision does not define what is meant by "any amount of previously funded PRB costs which revert or inure to the contractor."
 - The provision should explicitly state that the Government is entitled to an equitable share of previously funded costs only when the costs are ultimately reduced. The provision should not apply when benefits are reduced, but total costs are not. In the present environment, contractors may be required to reduce benefits to simply keep retiree health costs from increasing at an unsustainable level.
 - The provision is one-sided in entitling the Government to share in any proceeds resulting from overfunding, but shielding the Government from liability in the event of underfunding. The Section recommends that the provision should also provide for the Government to receive a pro rata share of the unfunded liability that exists at the time of a segment closing, plan termination, or curtailment of benefits.
- The last sentence of the proposed revision is unduly prescriptive. By explicitly dictating the required alternative methods of adjustment, it reduces the flexibility to negotiate an equitable adjustment that considers the unique facts relating to a particular situation.

2001-031-2

General Services Administration
FAR Secretariat (MVA)
Page 3

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



Hubert J. Bell, Jr.
Chair-Elect, Section of Public Contract Law

cc: Mary Ellen Coster Williams
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Marshall J. Doke, Jr.
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Gregory A. Smith
Council Members
Co-Chairs and Vice Chairs of the
Accounting, Cost & Pricing Committee
Richard P. Rector



2001-031-3

August 4, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

RE: FAR Case 2001-031

Dear Ms. Duarte:

The Aerospace Industries Association (AIA) is pleased to have the opportunity to comment on the proposed rule to amend the general provisions of the FAR cost principles.

We have provided our detailed concerns in Attachment 1 to this letter. A concern that we would like to highlight is the change to proposed Paragraph 31.205-6 (o) (3), specifying how a contractor must handle reversions of previously funded post-retirement benefit (PRB) costs other than pensions. We believe adding this prescriptive language to the cost principle limits the Contracting Officer's exercise of personal initiative and sound business judgment in deciding how the reversion amounts will be returned to the Government. We have recommended alternative language in the attachment.

Our recommended changes to proposed 31.206-6(o) (3) are aligned with the FAR guiding principles and contracting officer responsibilities. In addition, our recommended changes to proposed 31.205-6(k) (2) and (o) (2) will add clarity and eliminate possible misinterpretations without changing their intent.

If all of our recommended changes are not accepted, we request that the proposed rule, as written, be withdrawn. If you have any questions concerning our comments, please call Mr. Dick Powers of my staff on 703 358-1042. Dick can be reached by email at the following address: powers@aia-aerospace.org.

Sincerely,

A handwritten signature in black ink that reads 'Robert T. Marlow'.

Robert T. Marlow
Vice President
Government Division

Attachment

Specific comments on revisions proposed under FAR Case 2001-031

FAR 31.205-6 (k), Deferred Compensation Other Than Pensions:

The proposed FAR 31.205-6(k) (2) language should be clarified with regard to the phrase "...awards are made in periods subsequent..." Although this language essentially exists today, the word "made" could be misconstrued to mean "paid" versus when the award program is instituted.

- Alternative language is provided below to clarify when deferred compensation awards are considered unallowable.

FAR 31.205-6 (k) (2) should be revised to state "*Deferred compensation awards are unallowable if the award program is instituted in a period subsequent to the accounting period when the work being remunerated was performed.*" This makes it clear that if the deferred compensation plan was adopted after the end of the contractor's accounting period, expenses applicable to the prior year would be unallowable. Our alternative language is consistent with the conditions for incurrence of an obligation specified in CAS 415-(50) (a).

FAR 31.205-6 (o), Postretirement benefits other than pensions (PRB):

- Proposed FAR 31.205-6 (o) (2) (iii) (A) revises the language currently in the FAR dealing with the unallowable portion of PRB costs attributable to past services. The proposed language could be interpreted to mean that the entire amount of PRB costs attributable to past services is unallowable, not just the portion of the PRB costs in excess of the amount assignable under the delayed recognition methodology. This potential misinterpretation should be prevented by replacing the words "cannot exceed" with "*that is in excess of,*" and adding "*is unallowable*" at the end of the sentence.

As revised, FAR 31.205-6 (o)(2)(iii)(A) would read as follows: "However, the portion of PRB costs attributable to past service ("transition obligation") as defined in Financial Accounting Standards Board Statement 106, paragraph 110, "*that is in excess of*" the amount assignable under the delayed recognition methodology described in paragraphs 112 and 113 of Statement 106 "*is unallowable.*"

- Proposed FAR 31.205-6 (o) (3), changed the wording from the current version to include language that grants the Government an exclusive right to decide the disposition of the equitable share, and effectively limits the Contracting Officer's authority to negotiate the manner in which reversions of PRB costs are returned to the Government. This exclusive right adversely affects contractors' interests and the cooperative efforts being expended by the parties to determine the Government's equitable share. Our opposition to limiting the Contracting Officer's authority to negotiate the manner in which PRB costs are refunded is consistent with the FAR guiding principles and contracting officer responsibilities outlined in FAR Subparts 1.102 and 1.602. For example, FAR Subpart 1.602-2 states that "Contracting Officers are responsible for ...safeguarding the interests

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of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment.” Therefore, we recommend the following alternative language that will provide the Contracting Officer and the contractor with “wide latitude” to reach mutual agreement on a refund method that best protects the interests of both parties.

FAR 31.205-6 (o) (3) should be revised to say: *“When determining and agreeing on the method for treating the equitable share, the contracting parties should consider the following methods: cost reduction, amortizing the cost over a number of years, cash refund or some other agreed upon method.”* This will provide the Government and the Contractor the opportunity and flexibility to determine the method that satisfies the interests of both parties.

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The Voice of the Industrial Base

July 21, 2003

General Services Administration
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Room 4035
Washington, D.C. 20405

ATTN: Ms. Laurie Duarte

Subject: FAR Case 2001-031, Deferred Compensation and Postretirement Benefits
Other Than Pensions

Dear Ms. Duarte:

The National Defense Industrial Association (NDIA) is pleased to submit comments on the proposed rule to amend the FAR cost principle at 31.205-6(k) and 31.205-6(o).

NDIA is a non-partisan, non-profit organization with a membership that includes over 1,100 companies – both large and small businesses – and more than 27,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services. Our members, who provide a wide array of goods and services to the government, include some of the nation's largest defense contractors.

Our members concur with and fully support the proposed amendment to 31.201-6(k), *Deferred compensation other than pensions*. The proposed changes will serve to streamline the cost principle by eliminating redundant language. The proposed changes will also help reduce ambiguity (e.g., changing the phrase at (k)(2) from “measured, allocated, and accounted for” to “measured, assigned, and allocated”).

Our members do not concur, however, with the proposed amendment to the current 31.205(o)(6) [new paragraph (o)(3)] that would specify how the contractor must handle refunds and credits. We believe it to be both unnecessary and undesirable.

Currently, the contracting parties have freedom to negotiate a method for handling refunds and credits on a case-by-case basis, taking into account the unique set of facts and circumstances applicable to the situation. The proposed amendment is unnecessary because our members believe the current language results in an equitable solution.

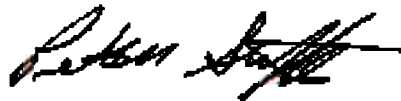
More importantly, when the government has the power to unilaterally dictate the method for handling refunds and credits there is no freedom to negotiate, and the government loses whatever consideration the contractor might offer in negotiations. This strikes us as undesirable, as the government stands to gain little in return for eliminating the negotiation of an equitable solution that takes into account the needs of both parties.

Our members also believe that the FAR Council has missed an opportunity to address long-festering issues in the current 31.205(o) language. We urge the Council to revise the existing language to address the following issues:

1. The existing language requires defense contractors to reduce a contract's firm fixed-price (via credit or cash refund) but does not provide for a contract's firm fixed-price to be adjusted upward. If a contractor's post-retirement benefits (PRB) plan becomes overfunded then the government expects a credit or refund; but if that same plan becomes underfunded the government owes nothing. The one-way nature of the adjustment is unfair and should be rectified in the final rule by clarifying that PRB plan closing adjustments operate the same way as pension plan closing adjustments.
2. The language is ambiguous regarding what it means to "reduce benefits" in a PRB plan. A contractor might reduce benefits but, because of increased costs in other areas, the allocable costs of the PRB plan might stay steady or even increase. We believe the language should focus on allocable costs and not on the level of benefits in the plan.

Our members encourage efforts to streamline and clarify Part 31 language. This current effort is flawed, however, because it fails to address substantive problems with the existing language. We encourage the FAR Council to consider the issues raised in this comment letter when issuing the final rule.

Sincerely,



Peter M. Steffes
Vice President, Government Policy
National Defense Industrial Association